

802.2(b)

April 30, 2007

Mr. B. Michael Verne
Federal Trade Commission
Premerger Notification Office
Room 303
600 Pennsylvania Avenue, NW
Washington, DC 20580

Via E-mail & Regular Mail

Re: Availability of 802.2(b) Exemption for Lease Buyout

Dear Mike:

Thank you for speaking with me today concerning the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") to my client's plan to buy out a lease from its current lessor. I am writing to summarize the facts I presented to you and to confirm your conclusion that no Premerger Notification and Report Form is required under the HSR Act.

As I described this morning, our client, Company A, filed for approval under the HSR Act to purchase a number of existing power plants in 1999. The HSR waiting period expired without action. Immediately before closing, Company A transferred the right to obtain legal title to two of the plants to Company B, an entity engaged in the business of entering into lease financing arrangements. Company A has therefore been the sole lessee of those plants since 1999. In addition, Company A has consistently and exclusively operated and possessed the two plants and has made all necessary regulatory filings on behalf of those plants.

Company B is now in bankruptcy. Accordingly, Company A, as the lessee, plans to buy out the lease from Company B. Prior to 1999, the facility was owned and operated by a party other than Company A or Company B.

This morning we discussed the applicability of 16 C.F.R. § 802.2(b) (certain acquisitions of real property assets; used facilities) to the proposed transaction. In particular, we discussed whether the exemption was available to the transaction I described even though Company A, the current lessee, was not the operator of the facility when it originally went into service but has been the operator of the facility continuously since 1999.

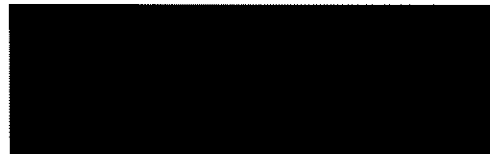
Mr. B. Michael Verne
April 30, 2007
Page 2

Based on the facts described above, you agreed that the transaction would qualify as exempt from Premerger Notification and Report filing under the HSR Act because the proposed transaction was in the spirit of the exemption provided under § 802.2(b) of the HSR Regulations, 16 C.F.R. § 802.2(b).

Thank you very much for your time, and please let me know at your earliest convenience if I have summarized our conversation incorrectly or if you have any concerns regarding the applicability of the HSR Act to this transaction. I can be reached at 202-828-5847.

Very truly yours,

AGREE-
4/30/07
Bw



Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, May 01, 2007 4:48 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: FW: HSR Filing Question

Hi, Mike -

Hope you're well. I am hoping to get your thoughts on the following transaction:

A financial investor (the "Investor") is making a \$55 million investment in a business in exchange for a series of securities that confer 32% of the voting power of the post-closing entity. The target business is currently held in three corporations, the ultimate parent entity of which is an individual (the "Founder"). Investor is not currently a shareholder of any of the companies. For purposes of this question, assume that the size of parties test is met by Investor and Founder.

To effect this transaction and combine the three target businesses under one corporate parent company, the parties have proposed the following transaction structure:

Step 1: Investor forms Holdco (a corporation) and wholly-owned subsidiary, Mergerco, and invests \$55 million in Holdco in exchange for the securities to which it is entitled in the transaction.

Step 2: Holdco purchases the common stock of two of the corporations from Founder in exchange for some of the contributed cash and Holdco voting stock. At closing of this step, Holdco will likely be controlled by Founder though it is possible that Investor will continue to control Holdco.

Step 3: Mergerco merges with and into the third corporation, and the stockholders of the third corporation (including the Founder) receive the balance of cash and Holdco voting stock in exchange for their shares. At this point Holdco will either be controlled by Founder or be its own ultimate parent entity.

After the completion of these steps, the three corporations will be wholly-owned subsidiaries of Holdco. Investor will own 32% of the voting securities of Holdco, Founder may own more, but will likely own less than 50% of the voting securities of Holdco (based upon the outcome of cash/stock elections that other shareholders may make) and the remaining former stockholders of the target business will own the remaining voting stock.

It appears to me that an HSR filing is not required based on these facts. Please let me know if you disagree.

Thanks as always!

[REDACTED]

IRS Circular 230 Notice (R&G)

Probably the appropriate way to look at this is as a formation of Holdco, with Investor, Founder and other shareholders contributing either cash or shares of target to the formation, because Holdco is being created solely for the purpose of effecting this transaction. It doesn't look like Investor or any of the other shareholders will hold voting securities of Holdco valued in excess of \$59.8 MM. Founder may, but his acquisition of Holdco shares would be exempt under 802.4 because he can exclude the value of the target shares he is contributing from the limitation on non-exempt assets.


5/2/07

801.10
7(A)(c)(10)**Verne, B. Michael**

From: [REDACTED]
 Sent: Wednesday, May 02, 2007 6:32 AM
 To: Verne, B. Michael
 Subject: Restricted Stock valuation 801.10(c)

Hi Mike, hope all is well with you. In this transaction A is acquiring B by merger. A is a publicly traded company. B shareholders will receive cash + A v/s. One shareholder (C") will receive restricted A v/s, C will have the present right to vote the A shares but not the present right to sell them, C will sign a stock restriction agreement that states the shares he receives will vest quarterly over 3 years, the first year, he will only vest in 1/3 of the total. He will be an officer of A.

To determine the value of the restricted A v/s to be received by C.

1. A v/s are publicly traded under 801.10(c)(1) the value would be the market price, the total market price here is approximately \$64 million.
2. However C is receiving restricted A v/s, therefore they are not publicly traded in that C may not sell them, so the value would be the acquisition price (which is undetermined) or the fair market value as determined by C (Rule 801.10(c)(2) & (3)). C must make a good faith determination as to the present value of the restricted A v/s and if it reaches the threshold must file.

If C determines the total value of the restricted A v/s does not presently reach the threshold no filing is required at this time. If when the A v/s held by C do vest (are no longer restricted), prior to the vesting C must determine if the total value of the A v/s has reached the threshold (801.1(c)(1)), if so C should submit an HSR at that time (30-days prior to vesting) unless an exemption applies.

Please let me know your thoughts.
 Many thanks as always for your guidance.

[REDACTED]

To comply with IRS regulations, we advise you that any discussion of federal tax issues in this email was not intended or written to be used, and cannot be used by you, (i) to avoid any penalties imposed under the Internal Revenue Code or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.

For more information please go to [REDACTED]

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[REDACTED]

1

Agree with 1 and 2. When the restricted shares vest, a filing would be required only if the percentage of A voting securities held by C increases. C has already acquired the A voting securities (although restricted), so no filing would be required upon vesting if the voting power of the vested shares is the same as the voting power of the restricted shares.

BW
5/2/07

802.63

May 2, 2007

BY E-MAIL

Mike Verne
Premerger Notification Office
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mike:

We would like to confirm that none of the steps in this transaction (the "Transaction") would be reportable under the Hart Scott Rodino Act (the "Act").

Parties

The acquiring party is HoldCo, a non-corporate entity formed specifically to acquire the assets described below pursuant to a secured party foreclosure. Prior to entering into the transaction, HoldCo will have no regularly prepared balance sheet and no assets other than interests in three wholly owned subsidiary companies — PlantCo 1, PlantCo 2 and ClaimCo — each of which will also hold no assets and have no regularly prepared balance sheet prior to the transaction. Holdco will be its own "ultimate parent entity."

All but one of the related parties in the Transaction were involved in a sale-leaseback financing (the "Pass Through Transaction") for two power plants (the "Plants") in 2000, as set forth in the diagram attached as Appendix A:

Pass Through Trust. The Pass Through Trust is a single purpose investment trust formed in connection with the Pass Through Transaction. As part of the sale leaseback arrangements, the Pass Through Trust issued certain pass through certificates (the "Certificates") to institutional investors and used the proceeds to acquire two nonrecourse promissory notes (the "Lessor Notes") from the equity participant in the sale leaseback (the "Owner Lessor"). The Pass Through Trust holds the Lessor Notes for the benefit of the holders of the Certificates (the "Certificateholders"). The Certificates represent fractional undivided interests in the Lessor Notes and any proceeds or distributions therefrom.

Owner Lessor. The Owner Lessor is a single purpose entity formed to serve as the equity participant in the Pass Through Transaction. The Owner Lessor acquired certain facilities related to the Plants (the "Facilities") with the proceeds of the Lessor Notes and an equity contribution from its immediate parent company. The Owner Lessor leased the Facilities back to the sellers pursuant to identical lease agreements (the "Facility Leases"). The Owner Lessor pledged the Facilities, its rights under the Facility Leases and certain other agreements, and all the proceeds thereof, as security for the Lessor Notes. The Lessor Notes are currently in default, but the Owner Lessor is *not* in bankruptcy.

Parent Corp.; Power Sub 1; Power Sub 2. Parent Corp. is a merchant power company that developed the Plants through two special purpose subsidiaries: Power Sub 1 and Power Sub 2. Power Sub 1 and Power Sub 2 sold the Facilities to the Owner Lessor in the Pass Through Transaction and leased them back pursuant to the Facility Leases. Parent Corp. guaranteed the payment and performance of the obligations of Power Sub 1 and Power Sub 2 under the Facility Leases and certain related agreements. Parent Corp., Power Sub 1 and Power Sub 2 are currently chapter 11 debtors in bankruptcy.

The bankruptcy of Parent Corp., Power Sub 1 and Power Sub 2 gave rise to events of default under the Facility Leases and under the Indenture for the Lessor Notes. After Power Sub 1 and Power Sub 2 moved to reject the Facility Leases in the bankruptcy cases and surrender the Facilities to the Owner Lessor, the Indenture trustee brought suit against the Owner Lessor for payment on the Lessor Notes in federal district court. On motion of the Indenture trustee, the district court appointed a receiver (the "Receiver"), who currently operates and has exclusive control over the Plants.

Assets

The assets to be acquired in the Transaction consist of the Plants, the Facilities and certain bankruptcy claims against Parent Corp. arising principally from Parent Corp.'s guaranty of the obligations of Power Sub 1 and Power Sub 2 under the rejected Facility Leases (the "Claims"). As a preparatory step to acquiring these assets in a foreclosure, HoldCo will acquire the Lessor Notes from the Pass Through Trust and then, by a strict foreclosure on a security for the Lessor Notes, acquire the Plants, the Facilities and the Claims.

Transaction Steps

Capitalization of HoldCo.

The Transaction provides that certain current Certificateholders will capitalize HoldCo by tendering their Certificates and contributing cash to HoldCo in exchange for interests in HoldCo. The majority, if not all, of the group tendering their Certificates in exchange for interests in HoldCo will have acquired these Certificates in the secondary market after the original Pass

Through Transaction. Some of the group tendering their Certificates will have acquired their Certificates after the bankruptcy filing of Parent Corp., Power Sub 1 and Power Sub 2. A subset of this latter group will have acquired their Certificates after the date Power Sub 1 and Power Sub 2 gave notice of their intention to reject the Facility Leases, and a further subset will have acquired their Certificates after the transition of the Plants to the control of the Receiver.

Acquisition of the Lessor Notes.

The Transaction further provides that HoldCo will pay cash and surrender all its Certificates to the Pass Through Trust in exchange for the Lessor Notes.

Acquisition of the Plants and the Claims.

In the final stage of the acquisition, the Owner Lessor and the Indenture Trustee will execute a strict foreclosure agreement, pursuant to which the Owner Lessor and the Receiver will transfer the Plants and the Facilities to PlantCo 1 and PlantCo 2 and the Claims to ClaimCo in consideration for the extinguishment of all indebtedness under the Lessor Notes.

Analysis

We would like to confirm the following:

- 1) The acquisition of Certificates by HoldCo is exempt from the requirements of the Act.

Because the Certificates are obligations which are non-voting securities, the capitalization of HoldCo is an exempt transaction pursuant to Section 7A(c)(2).

- 2) The acquisition of the Lessor Notes by HoldCo is exempt from the requirements of the Act.

Like the Certificates, the Lessor Notes are obligations which are non-voting securities. Consequently, the acquisition of the Lessor Notes is an exempt transaction pursuant to Section 7A(c)(2).

- 3) The acquisition of the Plants and Claims by HoldCo pursuant to the strict foreclosure agreement is exempt from the requirements of the Act.

The acquisition of the Plants and the Claims by HoldCo pursuant to the strict foreclosure is exempt from the requirements of the Act pursuant to Rule § 802.63, which exempts, among other things, acquisitions in foreclosure if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business. The Pass Through Transaction was a bona fide credit transaction entered into in the ordinary course of business of the Pass Through Trustee and the original Certificateholders. As

successor in interest to the original Certificateholders and to the Pass Through Trustee as holder of the Lessor Notes, HoldCo is a creditor in a bona fide credit transaction.

Furthermore, the so-called "Vulture Fund" exception to the foreclosure exemption does not apply. Albeit some Certificateholders acquired their Certificates after the bankruptcy filing of Parent Corp., Power Sub 1 and Power Sub 2, the debtor in this case is the Owner Lessor, which is *not* in bankruptcy.

- 4) Notwithstanding the "Vulture Fund" exception, the acquisition of the Claims by HoldCo is not subject to the requirements of the Act.

Parent Corp. and its affiliates have not yet filed a plan of reorganization. Consequently, the Claims may represent a right to receive either (i) voting securities or securities convertible into voting securities; (ii) non-voting securities; or (iii) cash. Thus, the Claims against Parent Corp. can be considered either (i) the equivalent of convertible securities, the acquisition of which is exempt under Rule § 802.31; (ii) the equivalent of non-voting securities, the acquisition of which is exempt under Section 7A(c)(2), or (iii) the equivalent of cash, the acquisition of which is exempt.

In the event that the foreclosure transaction is not exempt, and the acquisition of the Plants and Claims is subject to the requirements of the Act, we would also like to confirm the following additional points:

- 5) Assuming HoldCo has no assets other than the Lessor Notes and its interests in PlantCo 1, PlantCo 2 and ClaimCo prior to the foreclosure transaction, the total assets of HoldCo for the purposes of the size-of-person test would be \$0.

Because HoldCo will not be controlled by any other person and will have no regularly prepared balance sheet, the total assets of HoldCo will be determined pursuant to 16 C.F.R. 801.11(e). Since the Lessor Notes are securities of the acquired person, they are deducted from the total assets of HoldCo pursuant to 16 C.F.R. 801.11(e). Furthermore, prior to the acquisition, PlantCo 1, PlantCo 2 and ClaimCo will have no assets. Consequently, HoldCo will have no assets for purposes of the size-of-person test.

- 6) For the purposes of the size-of-transaction test, HoldCo may consider only the value of the assets received in consideration for debt acquired after the bankruptcy filing of Parent Corp., Power Sub 1 and Power Sub 2.

According to informal interpretations of the PNO, the acquisition of debt prior to a debtor's bankruptcy filing is regarded as a bona fide credit transaction in the ordinary course of a creditor's business, whereas the acquisition of debt after a bankruptcy filing is not. Consequently, the acquisition of assets in foreclosure is exempt to the extent the discharged debt was acquired in a bona fide credit transaction prior to a bankruptcy

[REDACTED]
Mike Verne

- 5 -

May 2, 2007

filing, and the acquisition of assets in foreclosure is reportable to the extent any discharged debt was acquired after a bankruptcy filing.

In determining the size of the foreclosure transaction, therefore, HoldCo would consider only the value of the Certificates acquired after the bankruptcy filing of Parent Corp., Power Sub 1 and Power Sub 2.

- 7) Assuming the Claims are not exempt from reporting, and to the extent that premerger notification is required, the Receiver is the acquired person in the Transaction.

Pursuant to Rule § 801.1(a)(1), the term "person" means an "ultimate parent entity and all entities which it controls directly or indirectly. The phrase "ultimate parent entity," in turn, signifies an entity that is not controlled by any other entity. Rule § 801.1(a)(3). The term "entity" expressly includes "a receiver for [a corporation, company or partnership], acting in his or her capacity as such." Rule § 801.1(a)(2).

Although title to the Plants will not be transferred until the foreclosure is accomplished, the Receiver, as an agent for the federal district court, has control of the Plants for all purposes, including operating the Plants for commercial purposes pending a resolution of the suit for payment on the Lessor Notes. Neither the Owner Lessor nor the Owner Lessor's ultimate parent has any control over the Receiver. Consequently, the Receiver is the "ultimate parent entity" for the Plants under his control and is the acquired person for purposes of the Transaction.

We look forward to your advice. Thank you for your assistance with this matter.

Yours sincerely,

[REDACTED]

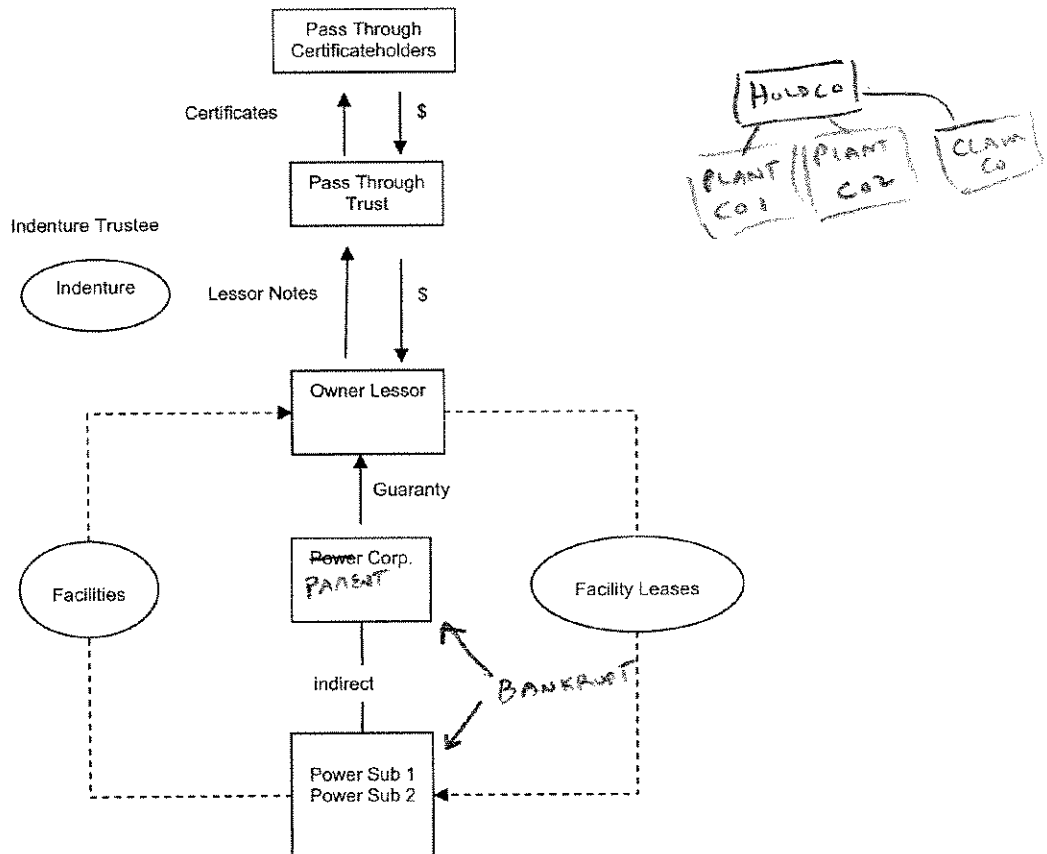
cc: [REDACTED]

[REDACTED]

AGREE - THIS IS
NON-REPORTABLE
B
5/3/07

APPENDIX A

2000 PASS THROUGH TRANSACTION



Verne, B. Michael

From: [REDACTED]
Sent: Sunday, May 06, 2007 10:10 PM
To: Verne, B. Michael
Subject: *please disregard my 2 emails sent Friday afternoon*

Dear Mike,

With my apologies, please ignore the two emails I sent last Friday as I am still getting to the bottom of some complicated facts, and don't want to pose my questions until I'm as sure as possible of the exact situation.

At the moment, I have only the following question:

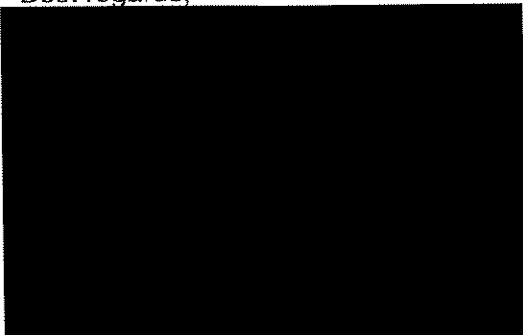
Is an Australian unit trust considered a trust for HSR purposes? Recently you advised me that an Australian stapled unit trust listed on the Australian stock exchange would be considered a non-corporate entity for HSR purposes, but I am not sure if the same answer applies here. I am told the following (by an Australian lawyer) about Australian unit trusts as applied to the entity I'm looking at, which is an investment vehicle with a trustee, "unitholders" (investors) and an investment advisor/manager:

An Australian unit trust is not an entity for Australian legal purposes. The trustee of the trust is the person, who under Australian law, is bound by relevant legal obligations etc and hold the legal powers with regard to the assets of the trust (eg the power to dispose of the assets, exercise any voting rights attached to the assets etc). I would expect in your case that you would look to the trustee of the trust. The investment manager will be a person who advises that trustee. Often an investment manager will have the power to advise the trustee as to disposals and voting of assets but it is the trustee who then implements the decision of the investment manager.


Seems to me that would be a trust for HSR purposes, please let me know if you agree.

As always, thanks so much for your advice.

Best regards,



When looking at US "trusts" to determine if they should be treated as non-corporate entities, the key is whether the trust has units that entitle the holder to a right to profits of the trust or a share of its assets upon dissolution. If this is the case, the trust should be treated as a non-corporate entity (these are generally considered business trusts). By contrast, a true trust (for HSR purposes) does not have units that confer economic benefits, but rather has a beneficiary that is entitled to the corpus of the trust at the time of some triggering event. I think the same analysis would apply to foreign trusts.


5/7/07

801.10

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, May 08, 2007 9:03 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR Question on Voting Securities Value

Mike,

We have a factual scenario that we wanted to run by you. It is our understanding that the following transaction would be deemed below the size of transaction threshold under the HSR Act. This is the question we called you about last night, but thought it might be helpful for us to email the facts to you.

Company A, which is its own ultimate parent entity ("UPE") plans to acquire 100% of the shares of Company B stock via a merger of Newco into Company B. Newco will be a wholly-owned subsidiary of Company A. Company B is also its own UPE. The consideration to be paid by Company A for the merger will consist of cash of approximately \$150 million.

Of the total consideration, approximately \$30 million in cash will be used to repay debt that is owed to third parties by Company B.

Company B has two classes of stock: Class A and Class B. Only the Class A stock carries the present right to vote for the election of directors of Company B. There are 8,333 shares of Class A voting stock outstanding and 75,000 shares of Class B non-voting stock outstanding. The holders of the Class A and Class B shares will receive the same per share consideration pursuant to the merger. Moreover, the holders of Class A and Class B shares are the same seven individuals, who together own all Company B shares in the ratio of 10% voting stock (Class A) and 90% nonvoting stock (Class B).

In addition, there is an earn-out provision under the merger agreement, pursuant to which if a certain consent is received from a third party, additional consideration will be paid by Company A of up to \$30 million post-closing. This payment would be payable to the shareholders of Class A and Class B stock as a post-closing adjustment and increase in the purchase price per share: again, the holders of the Class A and Class B shares will receive the same per share consideration.

Thus, the maximum total consideration to be paid by Company A to the shareholders of Company B in connection with the merger after debts owed to third parties have been repaid is up to \$150 million, of which up to \$15 million will be payable to the holders of voting securities in respect of such voting securities. The remainder of the consideration will go to the same 7 shareholders as consideration for Class B non-voting shares. We understand from the staff's informal HSR interpretations that if the purchase price per share to be paid per share of voting securities is clear in the operative agreement, that the transaction price allocable to the voting securities will be deemed determined, and the transaction will not meet the size of transaction test.

Thank you very much for your assistance with this question.

[REDACTED]

[REDACTED]

Agree
Bum
5/8/07

802.9
802.65

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, May 09, 2007 2:35 PM
To: Verne, B. Michael
Subject: Passive Investor Issue -- HIGHLY CONFIDENTIAL

Mike,

I wanted to follow up with you regarding the passive investor issue that we discussed the other day.

As I indicated, at present, the global [REDACTED] enterprise consists of [REDACTED] Association ("[REDACTED]") and its three regional group members: [REDACTED], each of which is its own ultimate parent entity. There are also three unincorporated regions, which are divisions of [REDACTED] (i) [REDACTED] (ii) [REDACTED] and (iii) [REDACTED] (the "Unincorporated Regions"). [REDACTED] members in the Unincorporated Regions are members of [REDACTED]

[REDACTED] intend to undertake a restructuring. The restructuring will take place in two stages. First, a newly formed entity, [REDACTED], will be established and incorporated in the United States. [REDACTED] will become subsidiaries of [REDACTED] through mergers with wholly-owned subsidiaries of [REDACTED]. [REDACTED] will remain outside of [REDACTED] and will become a licensee of [REDACTED]. As part of the restructuring, [REDACTED] the members of [REDACTED] in the Unincorporated Regions, and the members of [REDACTED] (collectively, the "Acquiring Members") will acquire voting securities in [REDACTED]. The majority of the board of [REDACTED] will consist of independent directors. The first step in the restructuring constitutes an HSR-reportable consolidation under 16 C.F.R. § 801.2(d).

Following the restructuring, [REDACTED] intends to issue and sell shares to the public through an initial public offering ("IPO"). The timing of the IPO is subject to regulatory and market conditions, but it is currently anticipated that the IPO would take place within 6-9 months following the restructuring. It is the intention that post-IPO the Acquiring Members will own no more than 49% of the total share capital of Visa Inc. The remaining 51% of the total share capital will be held by the public at large. Post-IPO the shares held by the Acquiring Members will become non-voting (except for voting requirements with respect to extraordinary events such as exiting the core payments business or a change of control of [REDACTED]) and confer only economic rights.

You have indicated that the acquisition of the voting securities of [REDACTED] Inc. by the Acquiring Members are potentially subject to the notification and waiting period requirements of the HSR Act.[1]
[REDACTED] - There are in excess of 14,000 Acquiring Members, most of which are

financial institutions. We anticipate that most of the Acquiring Members will be entitled to rely on the exemptions from the HSR Act set forth at 16 C.F.R. §§ 802.9 and 802.64. The issue has arisen as to whether the investment intent requirement, defined in 16 C.F.R. § 802.9, would be negated where an Acquiring Member: (i) controls a competitor that is not a competitor of [REDACTED] in the United States, but that competes at a national level in a country other than the United States; and (ii) will hold less than 0.5% of the voting securities of the [REDACTED] [2] [REDACTED]

I understand that the PNO has taken the position that being a competitor of the issuer creates a rebuttable presumption that the securities are not being held solely for the purposes of investment.[3] [REDACTED] In the present case, we believe that assuming the other indicia of investment-only intent are satisfied, that the presumption could be rebutted for the following reasons: (i) there is no impact on competition in the United States; (ii) the percentage of the voting securities held is de minimis (less than 0.5%); (iii) the proposed transaction results in Acquiring Members' losing (not acquiring) control over the [REDACTED] enterprise (e.g., following the restructuring the majority of the [REDACTED] board will be governed by independent directors and post-IPO, the Acquiring Members' shares will become non-voting (except for voting requirements with respect to extraordinary events such as exiting the core payments business and a change of control of [REDACTED])).

As always, I appreciate your guidance. If you need any additional information, please do not hesitate to contact me.

Regards,
[REDACTED]

[REDACTED]

AGREE -
SOLELY FOR PURPOSE
OF INVESTMENT IS
AVAILABLE.

M BAUNO, K BERG / K WALSH
CONCUR -

Brink
5/10/07

[1] [REDACTED] You have indicated that in the event an Acquiring Member concluded that it was required to file, no filing would be required by [REDACTED] as an acquired person, as the underlying transaction giving rise to the formation of [REDACTED] is a reportable consolidation.

[2] [REDACTED] It is possible that an Acquiring Member could value this percentage in excess of \$59.8 million.

[3] [REDACTED] Premerger Notification Practice Manual, 4th Ed., Int. #16.

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802.35

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, May 15, 2007 9:51 AM
To: Verne, B. Michael
Subject: UPE of Company controlled by ESOP Trust

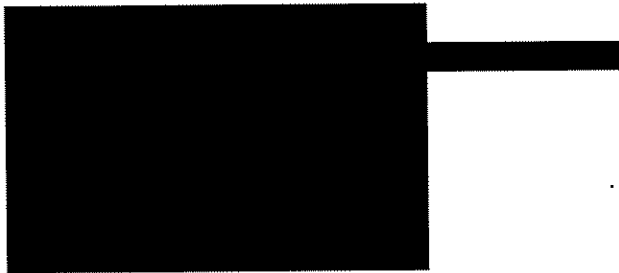
Dear Mr Verne:

Please clarify whether the ESOP Trust or the Corporation is the UPE for filing purposes in the following situation:

Employee trust ("ESOP Trust") that complies with section 401 of the Internal Revenue Code owns 85% of the outstanding stock of Corporation, the company which employs the employees who are the beneficiaries of the trust. Company has the contractual right to appoint the trustee of the ESOP Trust. No one else has a contractual right to designate a majority of the board of the Company.

ESOP Trust is now selling the stock of Company to third party in a transaction in which an HSR filing will be made. It is my understanding, consistent with section 802.35(b), that the ESOP Trust is controlled by the Company because of the Company's ability to designate the Trustee and that the Company is its own UPE in this situation. Therefore, the Company and not the ESOP Trust should be identified as the Acquired Person on the Acquired Person's filing.

Please confirm or correct my understanding. Thank you .



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CORRECT - THE COMPANY
IS THE UPE, NOT THE
ESOP.

Bruce
5/15/07

Verne, B. Michael

801.10

From: [REDACTED]
Sent: Wednesday, May 16, 2007 6:18 PM
To: Verne, B. Michael; Ferkingstad, James H.
Subject: Size of Transaction Issue

Dear Messrs. Verne & Ferkingstad:

I have a size of transaction threshold (\$59.8M) question. This is a stock deal in which several individuals are collectively acquiring 70% of stock of B. Only two (husband and wife) of the individuals meet the size of person test but collectively they alone may acquire about 50% of the stock. The stock of B is not publicly traded thus 801.10(a)(2) applies. The acquisition price has been set at roughly \$40 million and so under (a)(2) it should control and thus the size of transaction test is not met. The "wrinkle", however, is that, at or before closing, B plans to take out a loan of roughly \$50 million which will be distributed to the seller's sole shareholder as a dividend. I understand there are legitimate business and tax reasons for this loan/dividend structure, and the loan will be an obligation that the company will have on its books after the acquisition.

My initial analysis is that under (a)(2) the acquisition price controls and one need not add any or all of the loan/dividend amount to the acquisition price to determine if the size of transaction threshold is met. Thus, the transaction is not reportable. Is this correct or am I missing something? Thanks for your advice.

[REDACTED]

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[REDACTED]

Please visit our website at [REDACTED]

Agree -
BM
5/17/07

Verne, B. Michael

801.10

From: [REDACTED]
Sent: Wednesday, May 16, 2007 10:38 AM
To: Verne, B. Michael
Subject: Another question

Hi, Mike -

I have what is probably a straightforward question. This is the scenario:

LLC A is paying \$60 million cash ("Purchase Price") for 100% of the membership interests in LLC B (LLC A currently holds no interest in LLC B). LLC B holds a minority interest in LLC C; \$20 million of the Purchase Price is being allocated to the LLC C interest and an additional \$10 million of the Purchase Price is being allocated to LLC B options which are being cashed out. I understand that an acquisition of non-corporate interests is valued similar to an acquisition of non-publicly-traded securities so for purposes of 801.10(d), the value of non-corporate interests to be held as a result of the transaction would seem to be \$30 million? I am grappling with this because I could also see the value as being \$50 million (e.g., Purchase Price minus the options) or even \$60 million.

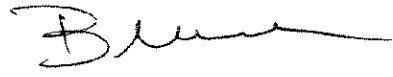
Thanks very much,
[REDACTED]

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This is a \$50 million deal. The value of the non-corporate interests of LLC B includes the value of the underlying minority interest in LLC C (despite the fact that the parties are separately allocating \$20 MM to that part of the transaction. This is akin to an acquisition of 100% of the voting securities of a corporation that holds minority interests in other corporations). Note, however, that the value of the interests in C would not count toward the limitation on non-exempt assets in an 802.4 analysis. The \$10 million value of the LLC B options that are being cashed out would not be included in the value of the LLC B interests unless they are being exercised prior to closing. Presumably they do not give the holder any present right to profits of LLC B or assets upon its dissolution.


5/17/07

801.1(b)

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, May 17, 2007 4:03 PM
To: Verne, B. Michael
Subject: question

Mike:

Thought I'd email you instead of calling. A and B (husband and wife) are the only members in a nonprofit corporation (nonstock), and the by-laws allow them to designate replacement members. Neither of them has the right to assets upon dissolution, or profits. Do they nevertheless "control" the nonprofit either through a literal reading of the term or because of 801.1(b)(2)? The latter would seem to require that by-laws be treated as synonymously with a "contract."

Thanks, Mike.

[REDACTED]

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Yes - they would control. A right to designate replacement directors in the by-laws is treated the same as a contractual right.

BW
5/18/07

801.1(b)

CONFIDENTIAL

VIA ELECTRONIC MAIL

May 17, 2007

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
7th & Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mike:

I am writing to confirm my understanding of a telephone conversation we had on May 3, 2007 concerning the basis for non-reportability under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act") for a proposed transaction.

Proposed Transaction

I have set forth below the general transaction we discussed, although I have added additional details to help further explain the proposed transaction. There is a proposed affiliation agreement whereby a non-stock, non-profit corporation ("Non-profit A") will become a corporate member of another non-stock, non-profit corporation ("Non-profit B") that operates a hospital. In exchange for Non-profit A becoming a corporate member of Non-profit B, Non-profit A will contribute to Non-profit B an amount equal to 30% of the net book value of Non-profit B. After the transaction closes, the other corporate member of Non-profit B will be a religious congregation ("Congregation") that currently sponsors Non-profit B. Non-profit A will have a 30% membership interest in Non-profit B and the Congregation will have a 70% membership interest in Non-profit B. Non-profit A and Congregation are jointly referred to as the Corporate Members. Each of the two Corporate Members will have equal rights, powers and responsibilities post-close with regard to the operation of Non-profit B except that upon a dissolution of Non-profit B, Non-profit A would have the right to 30% of the assets and Congregation would have the right to 70% of the assets.¹ Further, to ensure compliance with the

¹ There also are options I did not raise on our call whereby Non-profit A could increase its membership ownership interest in Non-profit B from 30% to 45% by making increased contributions to Non-profit B. This increased ownership would only impact the percentage of assets that Non-profit A would be entitled to upon the dissolution of Non-profit B. It would not change other rights including those related to the designation of members

[REDACTED]

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Ethical and Religious Directives for [REDACTED] and to veto any program or service that adversely impacts or violates such Directives, any disagreement between the Corporate Members regarding such veto shall be resolved by the [REDACTED], with ultimate determination by the [REDACTED] as interpreted by the [REDACTED].


As a part of the transaction, amended and restated bylaws will be adopted for Non-profit B. Under the amended and restated bylaws, the Corporate Members will delegate operating responsibility to a joint committee and a board of trustees except for responsibilities reserved solely for the Corporate Members which will be subject to a unanimous vote of the two Corporate Members. There are a substantial number of such reserved responsibilities for the Corporate Members of Non-profit B including, but not limited to, amending the bylaws or articles of incorporation, approving expenditures and commitments above certain dollar thresholds, changing or reducing services offered, appointing the executive director -- the administrator in charge of the hospital (in consultation with or on recommendation by the board of trustees), approving the annual budgets, approving the annual strategic plan and any updates, approving or disapproving a merger or dissolution, revising the reserved powers, and reserving such additional powers as the two Corporate Members jointly determine.

With regard to the joint committee, each of the two Corporate Members will appoint two representatives to the joint committee. Although the Corporate Members can jointly decide to delegate additional powers to the joint committee, the responsibilities of the joint committee outlined in the amended and restated bylaws include conducting an annual evaluation of and setting the compensation of the executive director, and appointing and removing the members of the board of trustees of Non-profit B other than three individuals appointed by Non-profit A, three individuals appointed by the Congregation and the president of the medical staff of the hospital who serves as a member of the board of trustees. The joint committee can only act upon a unanimous vote of the four representatives to the joint committee.

The board of trustees will consist of the three trustees appointed by Non-profit A, the three trustees appointed by Congregation, a number of community trustees appointed by the joint committee, physicians appointed by the joint committee and the president of the medical staff of the hospital. The responsibilities of the board of trustees set forth in the amended and restated bylaws include, but are not limited to, conducting the affairs of Non-profit B and holding powers not otherwise reserved to the joint committee or the Corporate Members, electing officers other than the executive director, appointing and reappointing physicians to the hospital medical staff, developing long range strategic plans for approval by the Corporate Members, assessing the quality of patient care, education, and research being conducted in the

of the board of trustees. Accordingly, my understanding is that the exercise of these options would not result in any HSR reporting obligation. If you believe this understanding is incorrect, please let me know.

[REDACTED]


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hospital, and reviewing and recommending for approval by the Corporate Members the annual budgets and assuring the hospital is managed within the approved budgets. However, no action of the board of trustees shall be a condition precedent to an action of the Corporate Members.

Conclusions

You agreed that the proposed transaction is not reportable under the HSR Act. Specifically, you confirmed the following:


- The only HSR control test applicable to non-stock, non-profit corporations is having the contractual right presently to designate 50% or more of the directors of the not-for-profit corporation. 16 C.F.R. § 801.1(b)(2).
- The board of trustees discussed above is the same as a board of directors under 16 C.F.R. § 801.1(b)(2).
- Non-profit A will not control Non-profit B for HSR purposes as Non-profit A will not have the right to designate 50% or more of the members of the board of trustees of Non-profit B.
- Non-profit A will not be deemed to have the power to designate the directors selected by the joint committee.
- The conclusion that Non-profit A does not control Non-profit B for HSR purposes is not impacted by the fact that Non-profit A will equally control Non-profit B with regard to any powers reserved by the Corporate Members for themselves or designated to the joint committee.
- The acquisition of a non-controlling interest in a non-profit corporation, such as the acquisition that will be made by Non-profit A in Non-profit B, is HSR exempt regardless of dollar value, and the applicable rule to support this conclusion in the case of a non-stock, non-profit corporation is 16 C.F.R. § 801.2(f)(3). That rule provides that "[a]ny person who acquires control of an existing not-for-profit corporation which has no outstanding voting securities is deemed to be acquiring all of the assets of that corporation."

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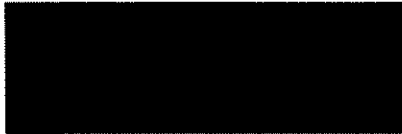





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Please let me know as soon as possible if you disagree with any of the conclusions discussed above, or if I have misunderstood any aspect of your advice. Thank you for your assistance in this matter.

Sincerely,



Agree -

5/17/07

